No. 374

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IN THE

SUPREME COURT OF THE UNITED STATES.

C. FRANK SMITH,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

BRIEF

In Opposition to the Petition for the Writ of Certiorari.

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee.

EDGAR P. CALHOUN,
Assistant Attorney General,
State of Tennessee.

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In Opposition to the Petition for the Writ of Certiorari.

MAY IT PLEASE THE COURT:

The respondent, State of Tennessee, for its statement in opposition to the petition for the writ of certiorari respectfully shows to the Court as follows:

OPINIONS BELOW.

The original opinions of the Supreme Court of Tennessee upon petitioner's direct appeals from his convictions are included in the record of this cause, designated as Exhibits W, X, Y, and Z. The opinion of the Supreme Court of Tennessee upon the habeas corpus appeal and the opinion upon the petition to rehear that cause are designated Appendix A to the petition for writ of certiorari.

JURISDICTION.

Jurisdiction is sought under 28 U. S. C., Sec. 1257 (3).

QUESTIONS PRESENTED.

The respondent suggests that the questions presented to the Court should be stated as follows:

(1) Whether or not petitioner by his conduct waived the constitutional rights which he contends were denied him.

(2) Whether or not the judgment of the State Court rests on an adequate and independent non-federal ground.

STATEMENT OF THE CASE.

The defendant was convicted in the Criminal Court of Washington County, Tennessee, in two cases of passing forged papers with intent to defraud and two cases of fraudulent breach of trust. He was sentenced to serve three years in the State Penitentiary in each case, with two of the sentences to run concurrently so that petitioner's total punishment is six years confinement in the State Penitentiary. Appeals were made in these cases directly to the Supreme Court of Tennessee and the convictions were affirmed by that Court.

A petition for habeas corpus was filed in the Circuit Court of Washington County which alleged, in essence, that petitioner's constitutional rights were violated because of being forced to go to trial in the aforesaid cases without adequate time to prepare a defense and without counsel until the day of the first trial. The trial judge dismissed the petition for writ of habeas corpus and denied the relief sought, and upon appeal to the Supreme Court of Tennessee the judgment of the lower court was affirmed.

The Supreme Court of Tennessee approved the trial judge's finding of fact in disposing of the petition for writ of habeas corpus. The record of that hearing, which has been transmitted to this Court, reflects the State Court's determination that petitioner's cases were first set for trial on May 24, 1962, but that he was granted a continuance on the ground that he had not had time to secure counsel. It further appears that petitioner contacted Mr. Frank Bryant, an attorney, just before the September, 1962, term of court, but that Mr. Bryant agreed only to get the cases set two weeks into the term for petitioner, and did not agree to represent petitioner. Petitioner did not contact other lawyers until the day

before the trial, and, of course, none would represent him at that late date. Upon the trial date, September 24, 1962, the petitioner was without counsel, but the Court recessed briefly so that petitioner could obtain counsel.

The record further reflects that petitioner obtained Mr. Jack Vaughan of the Washington County, Tennessee, Bar Association to represent him, and that Mr. Vaughan made an oral motion to continue the cases because of lack of preparation. The oral motion, which was not reduced to writing, was overruled and did not appear in the records of the cases. It appears, however, that a similar motion was made and became a part of the record in another of the cases tried the following day.

The matters complained of in the petition for habeas corpus were not presented to the Tennessee Supreme Court upon direct appeal of the convictions. It appears that petitioner's apparent lackadaisical attitude toward his legal difficulties carried over even to the appeal of his convictions. This is suggested by the testimony of Mr. Vaughan upon the habeas corpus hearing by way of explanation as to why only certain issues were raised on direct appeal.

> "A. The only question, if the Court, please, that we went up on, the only thing we could go up on, due to the condition of the record, was the objections that I made to the form of an Inquisitorial Indictment, and they, of course, affirmed the convictions. The whole matter was hard to understand unless you were right in it because, first, I was compelled under the circumstances, with Mr. Smith's apparent anxiety to get back to some kind of business, to, the very next day, file a Motion for a new trial, which did not give me the time that I like to consider what I would set out in a Motion for a new trial."
>
> Direct Testimony, Mr. Jack Vaughan, page 54.

It appears that the criminal convictions against petitioner grew out of written transactions and there has been no showing to this date of any witnesses or evidence not presented which could have been presented at his trials. The petitioner is not an indigent person. He is a businessman with experience in security transactions.

BRIEF AND ARGUMENT.

I.

It is well settled that a constitutional right may be intentionally and competently waived, and the determination of whether there has been an intelligent waiver of the right in question depends upon the particular facts and circumstances surrounding each case, including the background, experience and conduct of the accused. **Cogdell v. State,** 193 Tenn. 261, 246 S. W. 2d 5; **Johnson v. Zerbst,** 304 U. S. 458.

It is equally well settled that the exercise of the right is, of course, subject to the necessities of sound judicial administration and the trial court may properly treat the conduct of the accused as a waiver of the right. **U. S. v. Arlen,** 252 F. (2d) 491; **Spevak v. U. S.,** 158 F. (2d) 594. The finding of the State Court as to the conduct of the petitioner is consistent with the decisions of the Federal courts in the foregoing cases.

II.

The Tennessee Supreme Court stated in its opinion as follows:

> "The judgments of conviction are not in any way shown to be void. No want of jurisdiction in the Criminal Court is shown upon the face of the record, either of the person, or the subject matter generally, or of the particular question to be decided or the relief assumed to be given. See State ex rel. Dawson v. Bomar, 209 Tenn. 567, 354 S. W. 2d 763 (1962).
>
> "The writ of habeas corpus cannot be used to review or correct errors of law or fact committed by a court in the exercise of its jurisdiction. State ex rel.

Potter v. Bomar, 209 Tenn. 577, 582, 354 S. W. 2d 767 (1962); State ex rel. Holbrook v. Bomar, 211 Tenn. 243, 246, 364 S. W. 2d (1963); State ex rel. Kuntz v. Bomar, ... Tenn. ..., 381 S. W. 2d 290, 291 (1964)."

Pages A5, A6, Petition for Writ of Certiorari.

The rule in Tennessee is that a habeas corpus petition filed by one imprisoned under a judgment is a collateral attack upon such judgment and cannot prevail unless the judgment is void. There is a conclusive presumption that all jurisdictional facts have been properly adjudicated and the judgment of a court of general jurisdiction is presumed to be valid unless the record itself affirmatively shows that the court rendering the judgment lacked jurisdiction of the subject matter or of the person. **State ex rel. Holbrook v. Bomar,** *supra.*

The law of Tennessee pertaining to the writ of habeas corpus was applied to petitioner equally and impartially as it is to all persons and classes in Tennessee; consequently, petitioner has not been deprived of due process of law as required by the Fourteenth Amendment to the United States Constitution. **Leeper et al. v. State of Texas,** 139 U. S. 462; **Hurtado v. California,** 110 U. S. 516.

Your respondent suggests that the record clearly reflects that petitioner could have raised all these questions upon direct appeal from his convictions but failed to do so. Assuming petitioner could not have raised such questions upon direct appeal then at the time of filing the petition, it appears the petitioner could have raised such issues by a proceeding in the nature of a writ of error *coram nobis* pursuant to Section 40-3411, Tennessee Code Annotated.

In view of all the foregoing, it is clear that the judgment of the Tennessee Supreme Court is based upon, or might have been based upon, a readily available and

substantial non-federal ground, and the Supreme Court of the United States will not take jurisdiction to review the judgment. **Durley v. Mayo**, 351 U. S. 277.

Respectfully submitted,

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee,

EDGAR P. CALHOUN,
Assistant Attorney General,
State of Tennessee.

Certificate of Service.

I, George F. McCanless, Attorney General of the State of Tennessee, one of the attorneys for the respondent and a member of the bar of the Supreme Court of the United States, hereby certify that on the 13th day of August, 1965, I served a copy of the within brief in opposition to the petition for the writ of certiorari on C. Frank Smith, petitioner, by mailing said copy in a duly addressed envelope, postage duly paid, to Mr. Bernard H. Cantor, Attorney at Law, 126 Spring Street, Johnson City, Tennessee, counsel for petitioner.

George F. McCanless,
Attorney General,
State of Tennessee.